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No. 01-790

In The

Supreme Court of the United States

Supreme Court, U.S.
FILED
DEC 4 2001
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STATE OF IOWA and IOWA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

ROYCE L. ANTHONY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Iowa

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does application of the overtime provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. § 207(a)(1), to the States violate State sovereignty guaranteed by the Tenth Amendment of the United States Constitution?

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PARTIES

Petitioners are the State of Iowa and the Iowa Department of Public Safety, an agency of the State of Iowa. No corporate disclosure statement is required of Petitioners.

Respondents, all individuals, are: John R. Abeltins, Loren E. Achenbach, Arthur V. Ades, Robert G. Alles, Millard N. Anderson, Jerry Angle, Royce Anthony, Charles S. Antle, Kenneth J. Arduser, Richard D. Aringdale, Donna Bacus, Charles A. Black, Roger Brown, Randy Bulver, Fred O. Burger, Mark Casey, Calvin W. Clark, Regina Clemens, Randy Coffman, Steven R. Conlon, Gary Joseph Cooney, Daniel R. Cowie, Darrel L. Cox, Robert Cox, Mark Davis, Dean DeKoter, Joseph Diaz, Michael Downs, David L. Dudley, Nickolas O. Durian, Loren E. Dykeman, James K. Ehresman, David A. Eick, Robert W. Elliott, David L. Engelhardt, Marlo R. Feick, Richard F. Fellin, Frank J. Fisher II, Lavern V. Foughty, Thomas K. Gabriel, Charles Gambell, David Garrison, Robert O. Garrison, Meerilyn Goepel on behalf of Larry Goepel, Blaine Goff, Robert J. Gorsuch, Michael D. Gritton, Wayne Hampton, Robert Hansen, Kenneth Ruben Heimgartner, Jimmy Dean Hein, Curtis Henderson, Jerry R. Henderson, Rick J. Henderson, Garry L. Herrick, Terrance Hoil, William Hon, Garry L. Hoskins, Patrick Hoye, Larry A. Hutchinson, Daniel E. Jahnke, Larry D. Jones, Randall J. Jones, McKinnely Jontz, Jr., David Kaszinski, Jerry Ketchum, Richard J. Kinseth, Ralph Eugene Klein, Bradley Krei, Randy Kunert, Mahlon Y. Lamp, Thomas Lampe, Timothy Leinen, Dennis Edward Liekweg, Sr., Edward Thomas Linder, Steve Loftus, Mark A. Logsdon, James Loveland, Ronald G. Makin, Steven D. Marsh,

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LOWER COURT DECISIONS

The Iowa District Court in and for Polk County entered its Ruling on Defendants' Motion for Summary Judgment, Plaintiffs' Motion for Summary Judgment, and Defendants' Motion to Strike on February 26, 1999, in Case No. CI 68918.

On September 6, 2001, the Iowa Supreme Court issued the opinion for which review is sought, *Anthony v. State*, 632 N.W.2d 897 (2001).

JURISDICTION OF THE COURT

On September 6, 2001, the Iowa Supreme Court issued the opinion for which review is sought. The Court held that the State of Iowa and the Iowa Department of Public Safety were liable for overtime wages under the Fair Labor Standards Act of 1938, 29 U.S.C. § 207(a)(1), and remanded the case to the Iowa District Court for a determination of damages. There are no other federal issues to be decided in this case and the Iowa Supreme Court's opinion is a final judgment for purposes of this Petition. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 478-80 (1975).

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

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CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

I. United States Constitution, Amendment 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

II. 29 U.S.C. § 207 (Fair Labor Standards Act of 1938)

§ 207 Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

III. 29 U.S.C. § 213 (Fair Labor Standards Act of 1938)

§ 213 Exceptions

(a) Minimum wage and maximum hour requirements

The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to –

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities);

IV. 29 C.F.R. § 541.118 Salary basis

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is

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also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

* * *

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

STATEMENT OF THE CASE

This is an action filed by 140 individuals against the State of Iowa and the Iowa Department of Public Safety,

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the State agency responsible for law enforcement in the State of Iowa. Plaintiffs are current and former employees of the Department of Public Safety in executive and administrative positions. Plaintiffs filed this case to recover overtime pay pursuant to the Fair Labor Standards Act of 1938 (hereinafter "FLSA"), 29 U.S.C. § 207(a)(1). Because Plaintiffs worked in executive and administrative positions, they were exempt from the overtime requirements of the FLSA pursuant to 29 U.S.C. § 213(a). However, Plaintiffs relied on a Department of Labor regulation which required that an exempt employee "receive his full salary for any week in which he performs any work without regard to the number of days or hours worked." 29 C.F.R. § 541.118(a). This rule had been interpreted so that disciplinary suspensions without pay were impermissible deductions which would destroy an employee's exempt status and entitle the employee to overtime pay. *See* 29 C.F.R. § 541.118(a)(5). Plaintiffs' claim for damages was based on an allegation that they had been subject to a systematic policy of suspensions without pay by the Iowa Department of Public Safety.

In their Answer to Plaintiffs' Petition, Defendants alleged as an affirmative defense that "Plaintiffs' action [was] barred by the Tenth Amendment." (App. 45). Defendants filed a Motion for Summary Judgment claiming that the Tenth Amendment of the United States Constitution prohibited application of the FLSA to the States and that this Court's holding in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), had effectively been abrogated by more recent decisions of this Court. The Iowa District Court denied Defendant's

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motion on the Tenth Amendment issue (App. 25-28), noting that "until the United States Supreme Court overturns *Garcia*, it is for this Court not to speculate on what it might do and to follow its holding in *Garcia*." (App. 28). Defendants appealed to the Iowa Supreme Court, the Iowa court of last resort, all portions of the District Court decision which "denie[d] claims or arguments made by [D]efendants." (App. 47).

On appeal, the Iowa Supreme Court noted that the Defendants had changed the disciplinary policy in question to conform to the FLSA regulations to ensure that employees of the Department of Public Safety could not be suspended without pay. (App. 3). Nevertheless, the Court held that the Defendants were liable for past unpaid overtime pay because of their failure to comply with the applicable Department of Labor regulation, 29 C.F.R. § 541.118(a). (App. 14-15).

Of particular importance for this Petition, the Iowa Supreme Court characterized the issue before it as "whether the State [had] waived the sovereign immunity to which it is otherwise entitled under the *Alden* [*v. Maine*] decision." (App. 4). The Court also characterized this as a case of "waiver of sovereign immunity under the Tenth Amendment." (App. 6).[1] The Court then held that

---

[1] As a matter of law, there could have been no waiver of Tenth Amendment immunity by the State in this case. In determining the constitutional boundaries between the state and federal governments under our system of federalism and dual sovereignty, it is imperative that "[w]here Congress exceeds its authority relative to the States . . . the departure from the constitutional plan cannot be ratified by the consent of state

sovereign immunity had been waived because of Iowa Code chapter 91A, a wage collection statute that generally authorizes individuals to sue for unpaid wages. Administrative rules promulgated pursuant to that statute made reference to the FLSA and, on that basis, the Iowa Supreme Court concluded that the State had waived sovereign immunity. (App. 9). The Iowa Supreme Court affirmed the "judgment of the district court rejecting the State's sovereign immunity claim." (App. 10). The case was remanded to the District Court with directions to grant summary judgment against the State and to determine damages. (App. 15).

As a result of the holding of the Iowa Supreme Court, the State of Iowa is facing over $30 million in damage claims for past unpaid overtime. *See State could owe $30 million in back pay*, AP, Sept. 7, 2001, LEXIS, Nexis Library, AP File. The State has been forced to change its disciplinary policies for State law enforcement personnel to comply with the FLSA to avoid further liability. And this Court is faced squarely with the question of whether the Tenth Amendment prohibits application of the FLSA to the States.

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officials." . . . State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution." *New York v. United States*, 505 U.S. 144, 182 (1992).

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REASONS FOR GRANTING THE PETITION

I.

THE STATE COURT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT ON AN IMPORTANT MATTER OF FEDERAL LAW

A. Application of the FLSA to the States Is a Serious Breach of the Sovereignty of the States

In holding that the State of Iowa was liable under the FLSA, the Iowa Supreme Court subjected the State of Iowa to regulation under federal law in a manner repugnant to the Tenth Amendment and the most basic principles of federalism. Not only will the State be subject to substantial damage claims in this and other pending cases in a time of financial crisis, but, to avoid future liability under this federal law, the State will be forced to alter its manner of disciplining State law enforcement officials. Application of the FLSA to the State goes to the very heart of the relationship between a State and its employees. The most fundamental aspects of that relationship – the amount the State pays its employees and the manner in which it disciplines them for misconduct – are now dictated by federal law in the State of Iowa.

The burdens imposed on the State of Iowa by the FLSA are illustrated by the financial impact on the State. In November, 2001, the State of Iowa was forced to cut its State budget by $200 million because of the slow economy, and it appears that even larger budget cuts lie ahead. Des Moines Register, Nov. 28, 2001, found at http://www.dmregister.com. Plaintiffs are seeking damages of $30 million in cases presently pending against the State of Iowa for overtime claims. *State could owe $30*

million in back pay, AP, Sept. 7, 2001, LEXIS, Nexis Library, AP File. The FLSA has restricted the Department of Public Safety's use of its officers to such a degree that it is forced to send investigators home in the middle of major criminal investigations because it cannot afford overtime. Des Moines Register, Aug. 3, 2001. District supervisors of the Iowa State Patrol are scrubbing toilets and vacuuming offices because the state cannot afford janitorial workers in district offices. Cedar Rapids Gazette, July 21, 2001; Des Moines Register, Sept. 19, 2001.

This is a classic example of where the Federal Government has overstepped its bounds. By governing the most intimate relationships between a State and its employees, the Federal Government has damaged the State's fisc and impaired the State's ability to deliver necessary services to its citizens.

B. The Iowa Court's Reliance on the *Garcia* Case Was Misplaced in Light of More Recent Decisions of This Court Which Have Effectively Abrogated *Garcia*

The Iowa Supreme Court affirmed the Iowa District Court's denial of Tenth Amendment sovereignty to the State. The Iowa District Court based its ruling on this Court's 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). (App. 25-28). Reliance on the *Garcia* case, which will be analyzed in depth in section IIA, *infra*, was misplaced in light of more recent cases decided by this Court affirming and clarifying State sovereignty under the Tenth Amendment. In

particular, the decision of the Iowa Supreme Court conflicts with principles of federalism clearly enunciated in at least three cases decided by this Court after *Garcia*.

1. *New York v. United States*

In *New York v. United States*, 505 U.S. 144 (1992), this Court considered whether the Low-Level Radioactive Waste Policy Amendments Act of 1985 violated the Tenth Amendment. At issue was a provision of the Act that required a State to provide for the disposal of low-level radioactive waste generated within the State or, in the alternative, to take title to and possession of such radioactive waste within the State's borders. The Act imposed liability upon the State for damages caused by the State's failure to take possession of such waste promptly. *Id.* at 151-53.

In holding that this federal statute violated the Tenth Amendment, the Court recognized that the sovereignty of the States is one of the cornerstones of our form of government:

> [T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

Id. at 161 (Quoting from *Texas v. White*, 7 Wall. 700, 725, 19 L. Ed. 227 (1869)).

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The Court noted that the Tenth Amendment prohibits Congress from regulating the states directly:

> In providing for a stronger central government- . . . the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. . . . [T]he Court has consistently respected this choice. We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.

Id. at 167.

In the same vein, the Court relied upon the "anti-commandeering rule", noting that Congress lacked the power to "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 161. (Quoting from *Hodell v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)).

The court also noted that the federal statute impermissibly imposed liability upon the States if they did not promptly take possession of radioactive material: "Congress has crossed the line distinguishing encouragement from coercion." *Id.* at 176.

A major concern of the Court, and an additional basis for its decision that the Tenth Amendment prohibited the federal law in question, was the lack of accountability that would result if State officials were forced to follow federal law. On some matters, State residents might not wish to "bear the expense of a federally mandated regulatory program." *Id.* at 168. But, where State officials are

forced to follow a federal program, the State officials may "bear the brunt of public disapproval while the federal officials who devised the program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished. . . . " *Id.* at 169.

2. *Printz v. United States*

In *Printz v. United States*, 521 U.S. 898 (1997), this Court held that interim provisions of the Brady Handgun Violence Prevention Act violated the Tenth Amendment. *Id.* at 933, 935. The Brady Act required the chief law enforcement officer of each county to perform minor administrative tasks relating to background checks of individuals who purchased handguns. *Id.* at 903-04. These provisions were temporary until a federal background check system became operational. *Id.* at 902.

In holding the Brady Act unconstitutional, the Court confirmed the principles set forth in *New York*. It concluded "categorically, as [it] concluded categorically in *New York*: 'the Federal Government may not compel the States to enact or administer a federal regulatory program.' " *Id.* at 933. (Quoting from *New York*, 505 U.S. at 188). The Court rejected the argument that the Brady Act places "a minimal and only temporary burden upon state officers," stating that "it is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect." *Id.* at 932. The Court reiterated the essential principle of federalism: "it is an essential attribute of the states' retained sovereignty that they remain independent and autonomous within their proper

sphere of authority." *Id.* at 928. "[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Id.* at 933. (Quoting from *New York*, 505 U.S. at 187).

3. *Alden v. Maine*

Most recently, in *Alden v. Maine*, 527 U.S. 706 (1999), the Court held that the Eleventh Amendment protected the States from suit in their own Courts in an action brought under the FLSA. *Id.* at 760. The Court's analysis was based in part upon Tenth Amendment jurisprudence: "Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power." *Id.* at 713-14. The federal system embodied in our Constitution preserves the sovereign status of the states by reserving to them a "substantial portion of the nation's primary sovereignty, together with the dignity and essential attribute's inherent in that status." *Id.* at 714. The Court explicitly noted that the States "are not relegated to the role of mere provinces or political corporations." *Id.* at 715. The Court explained:

> When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due them as joint participants in a federal system, one beginning with the premise of sovereignty in both the

> central Government and the separate States. Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States.

Id. at 758.

One basis for the *Alden* court's decision was a realization that suits for money damages against the states:

> would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens. Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process. While the judgment creditor of a state may have legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principal of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.

Id. at 750-51.

The adverse financial impact from application of the FLSA to the States occurs in an environment where the federal officials responsible for the problem are not held politically accountable. "When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political

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accountability so essential to our liberty and Republican form of government." *Id.* at 751. "A State is entitled to order the processes of its own governance, assigning to the political branches, rather than the courts, the responsibility for directing the payment of debts." *Id.* at 752.

4. Application of the FLSA to the States Is Inconsistent with *New York*, *Printz*, and *Alden*

Application of the FLSA to the States is inconsistent with the basic principles of federalism confirmed in *New York*, *Printz*, and *Alden*. Although the FLSA does not commandeer the states in the same manner as the statutes at issue in *New York* and *Printz*, the practical effect is the same. The States are subject to direct application of federal law and are forced to change their relationships with their employees in determining wages and enforcing disciplinary policies. In this case, the State of Iowa must prohibit its Department of Public Safety from disciplining top law enforcement officials through suspensions without pay to comply with the FLSA. The penalty for not changing disciplinary policies is liability for overtime pay. And the citizens of the State of Iowa are forced to bear the expense of paying employees wages in compliance with the FLSA, even though this obligation was thrust upon them by federal officials, not their elected State officials.

There is no constitutional distinction between the level of burdens imposed by the FLSA on the States and the burdens imposed by the statutes found unconstitutional in *New York* and *Printz*. *Alden* recognized that lawsuits against the States to enforce overtime pay could

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impose "staggering burdens" on state treasuries that would "pose a severe and notorious danger to the States and their resources." *Alden*, 527 U.S. at 750. This strikes at the essence of State sovereignty, for "the allocation of scarce resources among competing needs and interests lies at the heart of the political process." *Id.* at 751.

Political accountability is sacrificed when the States are forced to govern their relations with their employees in the manner required by federal law. "Accountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." *New York*, 505 U.S. at 169. In his dissenting opinion in *Garcia*, Mr. Justice Powell warned that imposition of federal regulations against the States creates a special danger because federal agency staff employees are largely inaccessible and unresponsive to the general public. 469 U.S. at 576-77 (Powell, J., dissenting).

As a result of the decision of the Iowa Supreme Court, the State of Iowa has been forced to curtail law enforcement services because it cannot pay its top law enforcement officials according to the dictates of the FLSA. The State has been forced to change its disciplinary policies to avoid future liability under the FLSA. And the State officials – not the federal officials who are responsible for the FLSA and its regulations – are forced to bear the brunt of public disapproval of this situation. This is precisely the lack of political accountability which this Court warned against in *New York*, *Printz*, and *Alden*.

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The Federal Government cannot be allowed to impose wage and hour regulations and liabilities against the States if the balance of power between the States and the Federal Government is to be maintained. The States need the freedom to structure wages and hours for their employees so they can perform their public responsibilities in the most efficient and effective manner. The FLSA imposes regulations that force the States to restrict the services they provide, to make judgments on which services they must forego, and to eliminate State disciplinary regulations they believe serve the public interest. The FLSA is clearly a more burdensome regulatory statute than the statutes at issue in *New York* and *Printz*. The Court should similarly determine that application of the FLSA to the States violates constitutional principles of State sovereignty.

II.

THIS COURT SHOULD REFINE AND CLARIFY TENTH AMENDMENT JURISPRUDENCE AND OVERRULE *GARCIA*

A. *Garcia* Has Been Undermined By More Recent Federalism Cases of This Court

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Court held, by a 5 to 4 majority, that the FLSA could be applied to control the wage structure, hours worked, and other issues relating to the employment relationship between the San Antonio Metropolitan Transit Authority and its employees. *Garcia* overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), in which the Court previously held that Congress

could not apply the FLSA to the States because it impaired the States' ability to perform traditional governmental functions. *Id.* at 851.[2] National League of Cities held that the States' power to determine the wages which would be paid to their employees, the hours they would work, and their overtime compensation, if any, were "undoubted attribute[s] of state sovereignty." *Id.* at 845. While *National League of Cities* recognized Congress' power to enact minimum wage and maximum hour regulations against private employers, the Court held that Congress' power is limited when attempting to regulate a State due to constitutional provisions establishing State sovereignty. *Id.* at 845, 849.

In *Garcia*, the majority found the traditional governmental function analysis of *National League of Cities* to be unworkable in practice. *Id.* at 546-47. The Court did not adopt any new evaluative standard. Instead, the Court relied upon the State and local governments to protect their interests through the *political process* rather than through judicial intervention. *See id.* at 552-54, 56. The Court noted that, in that case, the political process had worked to protect the State and local governments from undue burdens: Even though the FLSA imposed financial burdens on the Metropolitan Transit Authority, Congress

---

[2] Although *Garcia* and *National League of Cities* both involved local governmental entities, the Court spoke in those cases as if it were applying the FLSA to the States. Although the Court distinguishes the States from the localities in analyzing sovereign immunity under the Eleventh Amendment, *Alden*, 527 U.S. at 740, the Court apparently treats States and localities the same for purposes of Tenth Amendment sovereignty. The reason for this distinction is unclear at best.

had provided more than $22 billion in mass transit aid to States and localities which left "individual mass transit systems better off than they would have been had Congress never intervened at all in the area." *Id.* at 555. The majority also argued that the San Antonio Metropolitan Transit Authority faced "nothing more than the same minimum wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet." *Id.* at 554.

Justices O'Connor and Rehnquist both stated in their dissenting opinions in *Garcia* that their views would one day again command the support of a majority of the Court. *Id.* at 580, 589. It appears that this prediction has come to fruition because the *Garcia* Court's analysis is contrary to the more recent federalism decisions of this Court in several important respects.

1. ***Garcia's* Reliance on the Political Process Is An Abdication of Judicial Responsibility To Protect State Sovereignty**

The *Garcia* holding that State sovereignty under the Tenth Amendment could be protected through the political process represents an abdication of judicial responsibility to guard the constitutional boundaries between the States and the Federal Government. *See Garcia*, 469 U.S. at 580 (O'Connor, J., dissenting). This holding is directly contrary to this Court's later acknowledgment in *New York* that the Court is constitutionally required to fulfill this responsibility:

> [T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve

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> power to the States. *The Tenth Amendment thus directs us [the Court] to determine, as in this case, whether an incident of State sovereignty is protected by a limitation on an Article I power.*

New York, 505 U.S. at 157. (Emphasis added).

Notwithstanding the holding of *Garcia*, this Court fulfilled its Constitutional obligation in both *New York* and *Printz* and held federal laws unconstitutional for violating the sovereignty of the States under the Tenth Amendment. There was no reliance in those cases on the political process to protect Tenth Amendment sovereignty.

Indeed, the Court regularly exercises its Constitutional powers to review congressional enactments under the Commerce Clause to see if they infringe on rights guaranteed by other provisions of the Constitution. In First Amendment cases, the Court balances congressional power under the Commerce Clause with the statute's impact on freedom of expression. *See, e.g., United States v. United Foods, Inc.*, 121 S.Ct. 2334, 2340-41 (2001) (holding Mushroom Promotion, Research and Consumer Information Act violative of the First Amendment); *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173, 195-96 (1999) (holding federal law restricting advertising of lotteries violative of the First Amendment); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995) (holding labeling restrictions in the Federal Alcohol Administration Act unconstitutional based on the First Amendment). In Fifth Amendment cases, the Court has held Congress' power is limited by individuals' rights to due process and a fair trial. *See, e.g., Dickerson v. United States*, 530 U.S. 428, 444 (2000) (finding 18 U.S.C. § 3501

unconstitutional per the Fifth Amendment rights previously announced in *Miranda v. Arizona*, 384 U.S. 436 (1966)). In Fourteenth Amendment cases, the Court has limited congressional action that impermissibly intrudes on the ability of States to perform their governmental functions. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (finding the Religious Freedom Restoration Act to be an unconstitutional intrusion on State and local governments).

In each of the cases cited above, the Court performed its constitutional responsibility to weigh the respective rights established in other provisions of the Constitution. As the Court stated in *City of Boerne*: "Congress' discretion is not unlimited . . . and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution." *Id.* at 536.

Moreover, Congress' authority under the Commerce Clause does have "judicially enforceable outer limits." *United States v. Lopez*, 514 U.S. 549, 566 (1995). In *Lopez*, the Court found the Gun-Free School Zones Act, which created criminal penalties for possessing a gun in a school zone, to be outside Congress' power under the Commerce Clause because it regulated purely local activities. *Id.* at 566-68. While the Court ultimately determined that Congress lacked authority under the Commerce Clause to regulate this type of local activity, the Court considered the boundaries of Congress' Commerce Clause power in the context of the impact that power has on states' rights. *Id.* at 552 (justifying its decision, in part, by stating the public interest in providing a "healthy balance of power between the States and the Federal

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Government [to] reduce the risk of tyranny and abuse from either front." (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1995)).

Reliance on the political process to protect the States' Tenth Amendment sovereignty is, indeed, an anomaly. This Court abandoned that concept in *New York* and *Printz*, and it should be abandoned in this case.

2. Reliance on the Political Process to Protect Dual Sovereignty Is Inconsistent With the Inability of the States to Agree to Federal Encroachment of States' Powers

The *Garcia* Court's reliance on the political process to protect Tenth Amendment sovereignty is also contrary to this Court's clear statement in *New York* that Tenth Amendment sovereignty is so fundamental to our constitutional structure that it cannot be compromised by agreement of the States. The *New York* Court stated:

> Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the "consent" of state officials. . . . The constitutional authority of Congress cannot be expanded by the "consent" of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.
>
> State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution.

New York, 505 U.S. at 182.

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If state and federal officials cannot agree to Congressional action which exceeds the constitutional bounds of the Tenth Amendment, how can the Court rely on the political process to protect Tenth Amendment sovereignty? The very essence of the political process is compromise and agreement. Yet the constitutional boundaries between the States and the Federal Government cannot be compromised, and the States cannot agree to allow the Federal Government to overstep its bounds. The constitutionally required balance of power between the States and the Federal Government cannot safely and reliably be determined by the politics of the day. It is properly determined by the courts, carefully guided by constitutional principles, and not subject to the political currents and expediencies of the times.

3. The Tenth Amendment Prohibits Federal Law From Being Applied to the States on the Same Basis As Private Individuals or Businesses

The majority in *Garcia* also justified its decision by arguing that the States were simply being required to follow a generally applicable federal law on the same basis as other employers, both public and private. *Garcia*, 469 U.S. at 554. In *New York*, the Court noted this argument and stated that its "jurisprudence in this area has traveled an unsteady path." *New York*, 505 U.S. at 160.

The argument that the Tenth Amendment allows the States to be subject to generally applicable federal laws is "inconsistent with the spirit of our constitution." *Garcia*, 469 U.S. at 588 (O'Connor, J., dissenting). Indeed, the

Alden Court recently reaffirmed that the Tenth Amendment requires that Congress accord the States "the esteem due to them as joint participants in a federal system." *Alden*, 572 U.S. at 706. Congress "may not treat these sovereign entities as mere prefectures or corporations." *Id.* The *New York* Court noted that, under our federal system, "the States possess sovereignty *concurrent* with that of the Federal Government." *New York*, 505 U.S. at 163 (quoting from *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (emphasis added)). These basic attributes of sovereignty belie any argument that a federal law is acceptable under the Tenth Amendment merely because it is applied to the States on the same basis as private individuals and businesses. Simply stated, the States are not in the same constitutional category as private individuals and businesses.

4. The *Garcia* Dissent Is Consistent with the Court's More Recent Decisions

The abrogation of *Garcia* is well illustrated by comparing the dissenting opinions in *Garcia* to the majority opinions in *New York*, *Printz*, and *Alden*. A careful review of these opinions shows that Chief Justice Rehnquist and Justice O'Connor were correct when they predicted in their *Garcia* dissenting opinions that their views would one day again be in the majority. *Garcia*, 469 U.S. at 580, 589.

Justice O'Connor stated in her *Garcia* dissent that the majority only considered whether Congress had the power to enact the FLSA pursuant to the Commerce Clause; it did not give weight to the state sovereignty

interests otherwise recognized in the Constitution. *Id.* at 588. Justice O'Connor states:

> It is insufficient, in assessing the validity of congressional regulation of a State pursuant to the commerce power, to ask only whether the same regulation would be valid if enforced against a private party. That reasoning, embodied in the majority opinion, is inconsistent with the spirit of our Constitution.

Id.

Justice O'Connor reiterated the rule from *National League of Cities* that Congress cannot regulate a State like a private party. *Id.* at 588. The framers of the constitution did not view the States' authority under the constitution to be weak. *Id.* at 582. The framers' comments show that the sphere of state activity was to be significant, and that the States would retain authority over those local concerns of greatest relevance and importance to the people. *Id.* at 588.

Mr. Justice Powell argued in his *Garcia* dissent that the majority decision incorrectly allows Congress, pursuant to the Commerce Clause, to usurp the States' traditional sovereign powers without any judicial review of its action. *Id.* at 575 (Powell, J., dissenting). Justice Powell points out that duties such as providing police protection epitomize the concerns of local government:

> In emphasizing the need to protect traditional governmental functions, we identified the kinds of activities engaged in by state and local governments that affect the everyday lives of citizens. These are services that people are in a position to understand and evaluate, and in a

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> democracy, have the right to oversee. We recognized that "it is functions such as these which governments are created to provide . . . " and that the States and local governments are better able than the National Government to perform them.

Id. at 575-76 (quoting from *National League of Cities).*

The rationale underlying the majority decision in *Printz* overlaps the rationale underlying the majority decision in *National League of Cities* and the *Garcia* dissents. In *Printz* and in the *Garcia* dissents, the Court stated that it is incontestible that the constitution creates a system of dual sovereignty designed to exercise concurrent authority over the people, who in Hamilton's words, were "the only proper objects of government." *Printz*, 521 U.S. at 918-20; *see Garcia*, 469 U.S. at 581-82 (O'Connor, J., dissenting) (describing the constitutional scheme by which power was divided between the Federal and State Governments). The Constitution divides power among the sovereigns and branches of government as a means to protect abuses of one or the other. *Printz*, 521 U.S. at 933; *Garcia*, 469 U.S. at 581-82 (O'Connor, J., dissenting).

The constitutional framers "explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Printz*, 521 U.S. at 920; *Garcia*, 469 U.S. at 588 (O'Connor, J., dissenting). Congress' power to regulate interstate commerce under the Commerce Clause does not permit it to infringe upon States' sovereignty rights as reflected in the Tenth Amendment. *Printz*, 521 U.S. at 923-24; *Garcia*, 469 at 583, 588 (O'Connor, J., dissenting). The symmetry between the majority opinion in

Printz and the dissenting opinions in *Garcia* demonstrate that the majority opinion in *Garcia* is no longer vital law.

B. Although Recent Decisions of this Court Were Intended to Protect the States from Liability under the FLSA, This Case Demonstrates that the Job Is Not Yet Complete

The Court's decision in *Alden* confirmed the States' sovereign status under the Eleventh Amendment by holding that Congress does not have power under Article I of the Constitution to abrogate a State's sovereign immunity in state court. *Alden*, 527 U.S. at 712. This followed the Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), where the Court held that Congress does not have authority to abrogate a State's right to sovereign immunity from suit in federal court pursuant to the Eleventh Amendment. *Id.* at 72-73. The *Seminole* Court specifically overruled a *Garcia*-era case, *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), in which a plurality of the Court ruled that congressional abrogation of state immunity was permissible pursuant to Congress' power under the Commerce Clause. *Seminole*, 517 U.S. at 66.

These cases confirm this Court's attempts to re-establish and protect the sovereignty of the States under our federalist form of government. They clearly were intended to protect the States from liability for claims under the FLSA. As this case demonstrates, however, the job is not yet complete. The State of Iowa has been held liable in this case because of a finding by the Iowa Supreme Court that the State had waived Eleventh Amendment immunity. States might also be subject to actions for injunctions for prospective injunctive relief

forcing compliance with the FLSA. *Ex Parte Young*, 209 U.S. 123 (1908); *Seminole*, 517 U.S. at 73. The Federal Government might bring enforcement actions against the States under the FLSA. *See Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374, n.9 (2001).

Relying on the Eleventh Amendment does not answer the more fundamental question of whether the States can be subject to the FLSA under any circumstances under the Tenth Amendment. Therefore, it is necessary to clarify Tenth Amendment jurisprudence, once and for all, and to overrule *Garcia* and hold that the States simply are not subject to the FLSA in any respect.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

app. I

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App. 1

Supreme Court of Iowa.

Royce L. ANTHONY, Kenneth J. Arduser, Richard D. Aringdale, Fred O. Burger, Steven R. Conlon, Joseph L. Diaz, Loren E. Dykeman, James K. Ehresman, Robert W. Elliott, Blaine Goff, Terrance Hoil, McKinnely Jontz, Jr., Ronald G. Makin, Larry G. Mathers, George H. Mayer, Timothy P. McDonald, Lee J. Meinert, Larry L. Noble, Bradford J. Thompson, Earl E. Usher, Jon R. Wilson, and Charles R. Wood, Appellants,

v.

STATE of Iowa and Iowa Department Of Public Safety, Appellees.

No. 99-0515.

Sept. 6, 2001.

Pamela J. Walker of Sherinian & Walker Law Firm, West Des Moines, and R. Todd Gaffney of Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C., Des Moines, for appellants.

Thomas J. Miller, Attorney General, and Jeffrey D. Farrell, Assistant Attorney General, for appellees.

CARTER, Justice.

Plaintiffs appeal from the grant of summary judgment for the State in their class action for overtime wages under the Fair Labor Standards Act (FLSA) and Iowa Code chapter 91A.[1] The State cross-appeals, urging that it

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[1] The named defendants in this action who are the appellees and cross-appellants are the State of Iowa and the Iowa Department of Public Safety. They will be referred to collectively as the State throughout this opinion.

is immune from plaintiffs' claims by reason of the decision in *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). The district court rejected the State's claim of sovereign immunity but granted the State summary judgment based on a federal regulation purporting to allow correction of wage-basis methodology that would otherwise render an employee subject to the act. On February 14, 2001, this court filed an opinion affirming the district court's decision on the merits and declining to rule on the sovereign-immunity issue. A petition for rehearing filed by plaintiffs was subsequently granted and that opinion, which was never published, was withdrawn. After again reviewing the record and considering the arguments presented in the original briefs and on the petition for rehearing, we reverse the judgment of the district court on plaintiffs' appeal but affirm that court's rejection of the State's sovereign-immunity defense.

Plaintiffs are current and former employees of the Iowa Department of Public Safety in executive and administrative positions. Because of the nature of their duties, the State asserts that they are not subject to the overtime pay requirements of the FLSA. Plaintiffs maintain that they are subject to such requirements because the manner in which they are paid includes deductions for disciplinary suspensions.

Plaintiffs originally filed an action in the United States District Court for the Southern District of Iowa seeking to establish their position. That court initially granted plaintiffs' motion for summary judgment on the merits of their claim and set a hearing on damages for a later date. Before that hearing could be held, the Supreme Court filed the decision of *Seminole Tribe v. Florida*, 517

U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), establishing the immunity of states under the Eleventh Amendment with respect to similar claims. Based on that decision, the district court dismissed plaintiff's action on jurisdictional grounds. *Raper v. Iowa*, 940 F.Supp. 1421 (S.D.Iowa 1996). That decision was affirmed on appeal. *Raper v. Iowa*, 115 F.3d 623 (8th Cir.1997).

At the conclusion of the federal litigation, plaintiffs filed the present action in state court. They reasserted the claim made in the federal litigation that they were not exempt from the application of the FLSA overtime requirements because of the State's disciplinary policy calling for suspensions without pay.

Plaintiffs and the State each filed motions for summary judgment. The State's motion relied on 29 C.F.R. § 541.118(a)(6), the "window of correction" regulation, which allows an employer to preserve an employee's exempt status under the FLSA if it corrects past violations of the salary test, which the employer is required to meet. It also claimed sovereign immunity based on the *Alden* decision. The district court rejected the sovereign-immunity claim. Relying on the window-of-correction regulation, the court granted the State's motion for summary judgment based on the assurance that the State had reimbursed those executive and administrative employees who had suffered deductions from their regular salaries for disciplinary reasons and had amended its personnel policies to preclude similar deductions from the salaries of the plaintiff class members in the future.

1. *The Sovereign-Immunity Issue.*

Because both parties have requested that we initially resolve the sovereign-immunity issue raised in the State's appeal, we consider that matter first. The critical question on that issue is whether the State has waived the sovereign immunity to which it is otherwise entitled under the *Alden* decision.

A. *The Alden decision.* In *Alden,* probation officers employed by the State of Maine brought a private suit for damages against the state in federal court alleging violation of the overtime provisions of the FLSA. *Alden,* 527 U.S. at 711-12, 119 S.Ct. at 2246, 144 L.Ed.2d at 652. As in the present case, the federal district court dismissed the plaintiffs' claim after the Supreme Court decided the *Seminole Tribe* case. The court of appeals affirmed. *Mills v. Maine,* 118 F.3d 37, 55 (1st Cir.1997). The *Alden* plaintiffs then brought the same suit in state court. Maine's appellate court ultimately found that the state was protected from suit under the doctrine of sovereign immunity. *Alden v. State,* 715 A.2d 172, 176 (Me.1998). The Supreme Court granted certiorari and held "that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." *Alden,* 527 U.S. at 712, 119 S.Ct. at 2246, 144 L.Ed.2d at 652.

In its *Alden* opinion, the Supreme Court discussed at length the preconstitutional history of the doctrine of sovereign immunity as well as application of the doctrine after the Constitution was adopted and later amended. The court emphasized that the states' immunity from

private suits for damages was a fundamental component of the states' sovereignty before the Constitution was adopted and was an integral consideration throughout the ratification process. *Id.* at 713, 119 S.Ct. at 2246-47, 144 L.Ed.2d at 653-54. The Court concluded that the Tenth Amendment removes "[a]ny doubt regarding the constitutional role of the States as sovereign entities . . . ," as it reserves all powers to the states that are not delegated to the federal government by the Constitution. *Alden*, 527 U.S. at 713-14, 119 S.Ct. at 2247, 144 L.Ed.2d at 653.

Following *Alden*, at least three state appellate courts have held that states are protected by the sovereign-immunity doctrine from private suits for damages based on the FLSA unless the state waives its immunity. *King v. State*, 260 Neb. 14, 614 N.W.2d 341, 347 (2000); *Allen v. Fauver*, 327 N.J.Super. 14, 742 A.2d 594, 598 (App.Div.1999); *Commonwealth v. Luzik*, 259 Va. 198, 524 S.E.2d 871, 877 (2000).

B. *Whether a waiver of sovereign immunity has been established.* One of the legal theories on which plaintiffs' claims are based in the present litigation involves the Iowa Wage Payment Collection Law, Iowa Code chapter 91A (1995). They urge that in combination the applicable statutes and administrative regulations classify the overtime compensation required by the Fair Labor Standards Act as "wages" subject to collection by legal action under Iowa Code sections 91A.8 and 91A.10(3). They urge that this statutory scheme is a waiver of the State's sovereign immunity under *Alden*.

1. *The issue-preclusion problem.* In considering the consequences of chapter 91A on the State's sovereign

immunity, we first encounter a potential issue-preclusion problem. The federal district court in which the plaintiffs first presented their claims rejected their attempt to establish a waiver of the State's sovereign immunity based on chapter 91A. The federal court's ruling on the sovereign-immunity issue was a final judgment on the merits of that jurisdictional issue. The federal court clearly had jurisdiction to determine its own jurisdiction.

Although the issue concerning waiver of sovereign immunity under the Eleventh Amendment in the federal litigation was similar to the issue of waiver of sovereign immunity under the Tenth Amendment in the present litigation, a close reading of the federal court ruling discloses reasons why it should not be given preclusive effect on the interpretation of chapter 91A. In rejecting plaintiffs' arguments on waiver of sovereign immunity based on chapter 91A, the federal court stated:

> As noted by defendants, however, plaintiffs' suit in the present case is brought under the FLSA – not Chapter 91A. Furthermore, there is no indication anywhere in Chapter 91A that a "court of competent jurisdiction" includes a *federal* court. "[I]n order for a state statute or a constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in federal court."

Raper, 940 F.Supp. at 1426 (citation omitted). This ruling did not consider whether chapter 91A allows plaintiffs to pursue their FLSA overtime claims in an action brought under that chapter in the Iowa courts.

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2. *The statutory pay plan.* For purposes of wage collections under sections 91A.8 and 91A.10(3):

> *"Wages"* means compensation owed by an employer for:
>
> *a.* Labor or services rendered by an employee, whether determined on a time, task, piece, commission, or other basis of calculation.
>
> *b.* Vacation, holiday, sick leave, and severance payments which are due an employee under an agreement with the employer or under a policy of the employer.
>
> *c.* Any payments to the employee or to a fund for the benefit of the employee, including but not limited to payments for medical, health, hospital, welfare, pension, or profit-sharing, which are due an employee under an agreement with the employer or under a policy of the employer. The assets of an employee in a fund for the benefit of the employee, whether such assets were originally paid into the fund by an employer or employee, are not wages.
>
> *d.* Expenses incurred and recoverable under a health benefit plan.

Iowa Code § 91A.2(7).

Section 91A.2(4) defines employer so as to include those identified as persons in Iowa Code chapter 4. Iowa Code section 4.1(20) includes state governmental agencies within the definition of "person." The State and its agencies are thus classified as employers subject to the Iowa Wage Payment Collection Law.

The State urges that, notwithstanding its liability for wage payments under chapter 91A, such liability only

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includes payments mandated by state law. Because plaintiffs' claims are based on federal law, the State urges that they do not fall within the chapter 91A collection procedure. We disagree.

The critical language in the section 91A.2(7) definition of wages is "compensation owed by an employer." Although the impetus for state wage policy involving FLSA overtime pay is the mandate of the federal legislation, the State has acceded to that mandate in a manner that establishes the resulting overtime remuneration as compensation owed by an employer. Iowa Code section 19A.9(2) provides that the director of the department of personnel shall adopt rules providing

> [f]or pay plans within the purview of an appropriation made by the general assembly and not otherwise provided by law for all employees in the executive branch of state government, excluding employees of the state board of regents, after consultation with the governor and appointing authorities with due regard to the terms of collective bargaining agreements negotiated under chapter 20 and after a public hearing held by the commission. . . . Each employee in the executive branch, excluding employees of the state board of regents, shall be paid at one of the rates set forth in the pay plan for the class of position in which employed and, unless otherwise designated by the commission, shall begin employment at the first step of the established range for the employee's class.

The rules adopted pursuant to this statute speak to the issue of FLSA overtime compensation in two places.

First, Iowa Administrative Code rule 581-1.1 provides by way of definition:

> *"Overtime"* means those hours that exceed 40 in a workweek for which an employee is entitled to be compensated.
>
> *"Overtime covered class, employee, or position"* means a class, employee, or position determined to be eligible for premium overtime compensation in accordance with the federal Fair Labor Standards Act.

Second, Iowa Administrative Code rule 581-4.11(2) provides:

> *Eligible job classes.* An employee in a job class designated as overtime eligible shall be paid at a premium rate (one and one-half hours) for every hour in pay status over 40 hours in a workweek.

We are convinced that the statutory scheme for deriving pay plans has been implemented in a manner that includes FLSA overtime remuneration as compensation owed by an employer. Sections 91A.8 and 91A.10(3) provide an express consent to sue in the Iowa courts for purposes of recovering any compensation thus owed.[2] We

---

[2] These statutes provide:

> When it has been shown that an employer has intentionally failed to pay an employee wages or reimburse expenses pursuant to section 91A.3, whether as the result of a wage dispute or otherwise, the employer shall be liable to the employee for any wages or expenses that are so intentionally failed to be paid or reimbursed, plus liquidated damages, court costs and any attorney's fees incurred in

affirm the judgment of the district court rejecting the State's sovereign-immunity claim.

II. *The Window of Correction Regulation.*

Under the FLSA, employers generally must pay their employees at least one and one-half times their regular rate of pay for hours worked in excess of forty hours per week. 29 U.S.C. § 207(a)(1). Employees who are employed in executive, administrative, or professional capacities are exempt from that overtime requirement. 29 U.S.C. § 213(a)(1). The Secretary of Labor is authorized to define by rule the scope of those exemptions. *Id.* Under these rules, three tests must be satisfied for an executive, administrative, or professional employee to be considered exempt. These are a "duties" test (29 C.F.R. § 541.1); a "salary level" test (29 C.F.R. § 541.1(f)); and a "salary basis" test (29 C.F.R. § 541.118). Only the salary-basis test is at issue in this case.

An employee is considered to be paid on a salary basis if "he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount

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recovering the unpaid wages and determined to have been usual and necessary.

Iowa Code § 91A.8. The provisions of subsections 1 and 2 [providing for suit by the commissioner of labor as the employee's assignee] shall not be construed to prevent an employee from settling or bringing an action for damages under section 91A.8 if the employee has not assigned the claim under subsection 1.

Iowa Code § 91A.10(3).

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constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a). In order to qualify for exempt status, "the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked." *Id.* The rule makes an exception for "[p]enalties imposed in good faith for infractions of safety rules of major significance." 29 C.F.R. § 541.118(a)(5). But, other reductions in pay such as disciplinary suspensions without pay are impermissible reductions that destroy an employee's exempt status. *Auer v. Robbins*, 519 U.S. 452, 456, 117 S.Ct. 905, 909, 137 L.Ed.2d 79, 87 (1997). The State's disciplinary suspension policies applicable to the plaintiff-employees did provide for disciplinary suspensions without pay, and that policy had been invoked in at least eight instances.

The Secretary's regulations also contain a "window of correction" clause. The rule implementing that clause provides:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. *On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer*

reimburses the employee for such deductions and promises to comply in the future.

29 C.F.R. § 541.118(a)(6) (emphasis added).

In the *Auer* case, the Supreme Court adopted the Secretary of Labor's interpretation of when a category of employees is considered to have satisfied the salary-basis test. It held that an employer has not demonstrated an objective intent to treat a category of employees as exempt from the FLSA if that employer has an employment policy that creates a significant likelihood of disciplinary pay deductions or has an actual practice of making disciplinary deductions from such employees' pay. *Auer*, 519 U.S. at 461-63, 117 S.Ct. at 911-12, 137 L.Ed.2d at 90-91. As to the category of employees involved in *Auer*, the court held that no clear inference could be drawn as to the likelihood of a sanction being applied to the employees because the employer's policy manual did not specifically identify the employees as being subject to disciplinary pay deductions. The Court explained that in the absence of actual deductions the Secretary's interpretation required "a clear and particularized policy – one which 'effectively communicates' that deductions will be made in specified circumstances." *Id.* at 461, 117 S.Ct. at 911, 137 L.Ed.2d at 90.

One employee in the group of employees before the Court in the *Auer* case had received a disciplinary pay deduction. As to that employee, the Court determined that the employer was entitled to a window-of-correction defense under 29 C.F.R. § 541.118(a)(6). In so holding, the Court stated:

> One small issue remains unresolved: the effect upon the exempt status of Sergeant Guzy . . . of the one-time reduction in his pay. The Secretary's regulations provide that if deductions which are inconsistent with the salary-basis test – such as the deduction from Guzy's pay – are made in circumstances indicating that "there was no intention to pay the employee on a salary basis," the exemption from the FLSA is "[not] applicable to him during the entire period when such deductions were being made." Conversely, "where a deduction not permitted by [the salary-basis test] is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future."

Id. at 463, 117 S.Ct. at 912, 137 L.Ed.2d at 91 (citation of regulation omitted).

The *Auer* decision was initially interpreted so as to allow the window of correction to be invoked in any instance in which the deductions were for reasons other than lack of work. *Paresi v. City of Portland*, 182 F.3d 665, 668 (9th Cir.1999); *DiGiore v. Ryan*, 172 F.3d 454, 465 (7th Cir.1999); *Davis v. City of Hollywood*, 120 F.3d 1178, 1180 (11th Cir.1997); *Childers v. City of Eugene*, 120 F.3d 944, 947 (9th Cir.1997); *Balgowan v. New Jersey*, 115 F.3d 214, 219 (3d Cir.1997). Following this first wave of appellate decisions, the second circuit in *Yourman v. Giuliani*, 229 F.3d 124, 128 (2d Cir.2000), and the sixth circuit in *Takacs v. Hahn Automotive Corp.*, 246 F.3d 776, 783 (6th Cir.2001), took the position that the window-of-correction defense is not available to an employer who has a policy of

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making pay deductions from salaries due to disciplinary infractions. The seventh circuit and ninth circuit have also embraced this view, thus abandoning their earlier pronouncements. *See Whetsel v. Network Property Servs.*, 246 F.3d 897, 902 (7th Cir.2001); *Klem v. County of Santa Clara*, 208 F.3d 1085, 1094 (9th Cir.2000).

We find the views expressed in the more recent federal cases to be persuasive. The *Auer* case interpreted the FLSA and the Secretary of Labor's regulations to provide that, if an employer is shown to have a general policy of making deductions from salaries for disciplinary violations, its pay plan for that class of employees is deemed not to be on a salary basis. Nothing contained in 29 C.F.R. § 541.118(a)(6) purports to nullify that interpretation. The factual setting in which the Court in *Auer* applied the window of correction was one in which no policy of docking pay was found to exist. Consequently, we favor an interpretation of the regulation in which the window of correction is only available to those employers who do not have an established policy of deducting their employees' pay for disciplinary reasons yet, in a few selected instances, have imposed such discipline. *See Whetsel*, 246 F.3d at 901; *Takacs*, 246 F.3d at 783.

We conclude that the record on the summary judgment motion revealed without dispute that the State did have a policy of imposing deductions from pay for disciplinary reasons with respect to the members of the plaintiff class. Based on our interpretation of the applicable federal law, that circumstance is outcome determinative on the issue of liability. The district court was wrong in granting summary judgment for the State. It should have

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granted summary judgment for plaintiffs on the issue of liability.

We have considered all issues presented and conclude that the State's claim of sovereign immunity should be rejected. The district court's grant of summary judgment to the State, based on the window-of-correction regulation, is reversed. The case is remanded to the district court with directions to grant summary judgment for the plaintiffs on the issue of liability and to proceed as necessary in the determination of damages. All costs on appeal are assessed to the State.

REVERSED AND REMANDED ON APPEAL; AFFIRMED ON CROSS APPEAL.

SNELL, S.J.,* participates in lieu of STREIT, J., who takes no part.

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* Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2001).

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IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

CLIFFORD DANIEL RAPER, et al., Plaintiffs, vs. THE STATE OF IOWA and THE IOWA DEPARTMENT OF PUBLIC SAFETY, Defendants.	Case No. CI 68918 RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' MOTION TO STRIKE (Filed Feb. 26, 1999)

These motions came before the court for hearing on December 31, 1998. Plaintiffs were represented by their counsel, Pamela J. Prager and R. Todd Gaffney. Defendants were represented by Assistant Iowa Attorney General Jeffrey D. Farrell.

RULING

I. ISSUES

A. Whether the doctrine of issue preclusion prevents Defendants from relitigating the salary-basis test applicability in this case because the United States District Court had issued a ruling regarding Defendants' liability before the federal case was dismissed.

B. Whether the State of Iowa is immune from suit in state court in an action pursuant to the Fair Labor Standards Act (FLSA).

C. Whether there is an issue of material fact whether Plaintiffs meet the salary-basis portion of the FLSA exemption test and whether Defendants are entitled to rely on the "window of corrections."

D. Whether the memo written by attorney Jeffrey Farrell to Commissioner Paul Wieck, II is protected by the attorney-client privilege so that Defendant's Motion to Strike should be granted.

II. STATEMENT OF THE CASE

Plaintiffs first filed this case in the United States District Court for the Southern District of Iowa on May 2, 1994. United States District Court Judge Longstaff granted partial summary judgment in favor of the Plaintiffs on October 27, 1995. Judge Longstaff ruled that the Plaintiffs in this case did not meet the salary-basis test portion of the regulation defining employees exempt under the FLSA. However, before a damage hearing and final judgment, the United States Supreme Court issued its opinion in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed. 252 (1996). The *Seminole* opinion held that states could not be sued in federal courts. As a result, on March 28, 1996 Judge Longstaff dismissed the federal court case for lack of subject matter jurisdiction. In April 1996, Plaintiffs filed this action in state court.

III. STATEMENT OF FACTS

The plaintiffs in this case are all current or former employees with the Department of Public Safety of the

State of Iowa (Department) as law enforcement officers holding ranks of sergeant, lieutenant, captain, major, colonel, special agent-in-charge, and assistant director. Plaintiffs have been regarded by the State and the Department as employed in a "bona fide executive, administrative or professional capacity," as salaried employees and thus exempt from the overtime provisions of the FLSA.

The Department of Public Safety Peace Officer Rules apply to all Department personnel. (Wieck Depo. p. 59-60). This means all Plaintiffs could be subject to discipline in the form of a suspension without pay. (Affidavit of Paul Wieck, pg. 3.) Six (6) of the Plaintiffs have been subject to suspensions without pay. (Affidavits of Charles Black, Kenneth Heimgartner, James Loveland, Carl Pedersen, Danny Petersen, and Douglas Stream.) Sergeant Black was suspended on August 22, 1994 for five (5) days. Sergeant Heimgartner was suspended on July 1, 1992 for one (1) day. Sergeant Loveland was suspended on October 1, 1993 for five (5) days. Lieutenant Pedersen was suspended on August 27, 1993 for one (1) day. Sergeant Petersen was suspended on January 1, 1996 for ten (10) days. Lieutenant Stream was suspended on September 12, 1994 for ten (10) days. (Defendants' Exhibit 5 attached to Defendants' Statement of Material Facts Not In Dispute filed in support of Defendants' Motion for Summary Judgment.) There was a total of eight (8) disciplinary suspensions, but two of the officers are not parties to this action.[1]

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[1] The two who are not plaintiffs are Paul Henze, who was suspended on January 15, 1997 for a period of five (5) days, and Sergeant Rick Ockerman, who was suspended on September 26,

In 1995, the Department's policy toward overtime hours was changed so that no person paid a predetermined salary on a regular basis was required to work more than forty (40) hours per week. In addition, beginning in 1997 the Department discontinued its practice of making disciplinary deductions from persons paid a predetermined salary on a regular basis are no longer subject to suspensions without pay but are only subject to "paper suspensions." This policy was formally changed in August, 1998.

IV. STANDARD OF REVIEW ON SUMMARY JUDGMENT

Iowa Rule of Civil Procedure 237 provides that summary judgment is appropriate only when the entire record before the court shows that no genuine issue of material fact is in dispute "and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 237(c). The record on summary judgment includes the pleadings, depositions, answers to interrogatories, admissions on file, affidavits, and exhibits. *Id.*; see also *Fischer v. Unipac Serv. Corp.*, 529 N.W.2d 793, 796 (Iowa 1994).

An issue of fact is "material" to this case when a dispute exists which may affect the outcome of the suit, given the applicable governing law. *Fees v. Mutual Fire & Auto. Ins. Co.*, 490 N.W.2d 55, 57 (Iowa 1992) (citing *Hike*

1996 for a period of ten (10) days. (See Defendants' Exhibit 5 attached to Defendants' Statement of Material Facts Not In Dispute filed in support of Defendants' Motion for Summary Judgment.)

v. Hall, 427 N.W.2d 158, 159 (Iowa 1988)). The rules of civil procedure's requirement that the issue must also be *genuine* "means that the evidence is such that a reasonable jury could return a verdict" for the party resisting the motion for summary judgment. *Id.* Thus, in determining whether a motion for summary judgment is to be granted, this Court must "determine whether any facts have been presented over which a reasonable difference of opinion could exist that would affect the outcome of the case." *Id.* (quoting *Behr v. Meredith Corp.*, 414 N.W.2d 339, 341 (Iowa 1987)).

Evidence in the entire record of any factual dispute is viewed in the light most favorable to the party resisting the motion for summary judgment. *Mewes v. State Farm Auto Ins. Co.*, 530 N.W.2d 718, 721 (Iowa 1995) (citing *Ciha v. Irons*, 509 N.W.2d 492, 493 (Iowa 1993)); *West Bend Mut. Ins. Co. v. Iowa Iron Works, Inc.*, 503 N.W.2d 596, 598 (Iowa 1993). The resisting party may not merely rely upon the allegations or denials found in the pleading, Iowa R. Civ. P. 237(e), but must, however, "set forth specific facts constituting competent evidence to support a *prima facie* claim." *Hoefer v. Wis. Educ. Ass'n Ins. Trust*, 470 N.W.2d 336 (Iowa 1991). This requirement is necessary "to weed out '[p]aper cases and defenses' in order 'to make way for litigation which does have something to it.' " *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 454 (Iowa 1989).

In light of these principles, this Court reviews the record made in support of and in resistance to the motion to determine whether summary judgment is an appropriate measure. *Hoefer*, 470 N.W.2d at 339.

Under the facts and issue presented in this particular case, a number of courts have found that since the United States Supreme Court opinion in *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), such cases are particularly amenable to resolution through summary judgment. The case of *Digiore v. Ryan*, 987 F.Supp. 1045, 1054 (N.D.Ill. 1997) stated this well:

> Instead, plaintiffs resort to arguing that the *Auer* test requires a factual inquiry inappropriate for summary judgment. But this argument fails because several courts have granted summary judgment using the *Auer* test, making it clear that whether a policy presents a significant likelihood of monetary discipline for a particular class of employees is a legal issue ripe at the summary judgment stage. See *Balgowan v. State of New Jersey*, 115 F.3d 214 (3rd Cir. 1997); *Childers v. City of Eugene*, 120 F.3d. 944 (9th Cir. 1997); *Carpenter v. City & County of Denver, Colo.*, 115 F.3d. 765 (10th Cir. 1997).

V. SUMMARY JUDGMENT MOTIONS

Plaintiffs and Defendants have each filed Motions for Summary Judgment. The Plaintiffs claim that the undisputed facts require this Court hold as a matter of law that Defendants do not meet the "salary-basis" test, that Defendants are not entitled to claim the exempt status, and that Plaintiffs are entitled to overtime pay. Defendants assert that they are entitled to the "window of corrections" exception under undisputed facts and therefore retain their exempt status from federal requirements of overtime pay to Plaintiffs.

Issue A. Issue Preclusion

In the federal court case, Judge Longstaff granted summary judgment in favor of the Plaintiffs as to liability, holding the State was liable to them for overtime pay under the FLSA. Plaintiffs argue that Judge Longstaff's ruling in the federal court case precludes the Defendants from relitigating the issue of the State's liability for overtime pay in this case. Plaintiffs also argue that when they appealed the dismissal of the federal case to the Eighth Circuit Court of Appeals, Defendants were required to cross-appeal Judge Longstaff's liability ruling and that failure to appeal entitled Judge Longstaff's ruling in Plaintiffs' favor preclusive effect in this state court action.

Although Judge Longstaff issued a written ruling on the Defendants' liability, the case was dismissed by that court for lack of subject matter jurisdiction before damages were determined and final judgment entered. Actions taken without subject matter jurisdiction are void. *In re Marriage of Seyler*, 559 N.W.2d 7, 12 (Iowa 1997). Void actions can be attacked collaterally. *Wederath v. Brant*, 287 N.W.2d 591, 595 (Iowa 1980). Therefore, Judge Longstaff's liability ruling, since it was dismissed for lack of subject matter jurisdiction, is a void judgment without any issue preclusive effect.

Additionally, Judge Longstaff's opinion did not address Defendants' ability to avail themselves of the "window of corrections" regulation. Judge Longstaff only ruled that the State's practice of taking disciplinary deductions violated the FLSA. His ruling predated the United States Supreme Court case of *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997).

Judge Longstaff addressed the *Auer* decision of the Eighth Circuit. At page 22 of his ruling, he stated: "Although the issue of the validity of the salary test was not before the *Auer* court [Eighth Circuit], the court stated in a footnote: . . . " After setting out the footnote, Judge Longstaff concluded: "In light of the Eighth Circuit's analysis in *Auer* regarding the limited application for the 'window of correction' and the statement by the court contained in footnote number 6, this Court concludes that the Eighth Circuit is likely to uphold the validity of the salary test regulations."

The specific issue decided by Judge Longstaff was not that established law excluded application of the "window of corrections," but whether the Eighth Circuit was "likely to uphold the validity of the salary-basis regulations." This case is now pending in state court and this Court is not bound by the federal district court's decision which is premised on the anticipated position of the Eighth Circuit Court of Appeals. It must also be noted that the Eighth Circuit *Auer* opinion differs from the later United States Supreme Court *Auer* opinion, since the Supreme Court, although affirming, clarified the Department of Labor's salary-basis test regulation, holding that:

> The Secretary's regulations provide that if deductions which are inconsistent with the salary-basis test – such as the deduction from Guzy's pay – are made in circumstances indicating that 'there was no intention to pay the employee on a salary basis,' the exemption from the FLSA is '[not] applicable to him during the entire pay period when such deductions were being made.' 29 C.F.R. § 541.118(A)(6) (1996). Conversely, 'where a deduction not permitted

> by [the salary-basis test] is inadvertent, *or* is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future. . . . [t]he plain language of the regulation sets out 'inadvertan[ce]' and 'made for reasons other than lack of work' as *alternative* grounds permitting corrective action. *Ibid.*

Auer, 117 S.Ct. at 912 (emphasis added).

Since Judge Longstaff's ruling did not decide the issue of applicability of the "window of corrections," particularly as discussed and clarified by the United States Supreme Court, it provides no basis for issue preclusion. This Court, at this stage of the proceedings is still able, in fact, required to apply the law as it exists at this time. See *West v. Anne Arundel County, Md.*, 137 F.3d. 752, 762 (4th Cir. 1998) (citing to *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 281, 89 S.Ct. 518, 526, 21 L.Ed.2d 474 (1969) "an appellate court must apply the law in effect at the time it renders its decision.") This same concept applies to this Court at this time in applying the United States Supreme Court decision in *Auer* not available to Judge Longstaff.

See also *Stanley v. City of Tracy*, 120 F.3d. 179, 181 (9th Cir. 1997), where the circuit court cited *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 113 S.Ct. 2510, 2517-18, 125 L.Ed.2d 74 (1993): "When [the Supreme] Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given retroactive effect in all case still open on direct review. . . . " Therefore, Judge Longstaff's ruling

does not require Plaintiffs prevail on their Motion for Summary Judgment due to issue preclusion.

Because of the foregoing, this Court also need not address Plaintiffs' argument that Defendants failed to cross-appeal Judge Longstaff's ruling on this issue to the Eighth Circuit Court of Appeals when Plaintiffs appealed his ruling dismissing the federal case on jurisdictional grounds.

Issue B. Sovereign Immunity

The minimum-wage and overtime requirements of the FLSA as applied to state employees do not interfere with the sovereignty of the states. *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 554, 105 S.Ct. 1005, 1019, 83 L.Ed.2d 1016 (1985). The FLSA does "nothing more than [require states to follow] the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet." *Id.*

Defendants argue that the United States Supreme Court's recent opinions indicate that it has stepped away from the *Garcia* opinion which made states subject to the FLSA and this Court should take the opportunity to ignore the *Garcia* opinion. This Court is not so inclined. Defendants raised this question earlier in a Motion to Dismiss before Judge Novak. Judge Novak found that *Garcia* governed this case and denied the Motion to Dismiss. The law of the case doctrine states: "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618, 103

S.Ct. 1382, 1391, 75 L.Ed.2d 318 (1983). The law of the case doctrine is inapplicable only "when an intervening opinion of a higher tribunal clearly demonstrates the law of the case is wrong." *Morris v. American Nat. Can Corp.*, 988 F.2d 50, 52 (8th Cir. 1993). See also *Springer v. Weeks & Leo Co., Inc.*, 475 N.W.2d 630, 632 (Iowa 1991):

> Generally, an appellate court decision becomes the law of the case and is controlling on the trial court and on any further appeals in the same case. *Lawson v. Fordyce*, 237 Iowa 28, 32, 21 N.W.2d 69, 73 (1945). See also R. Martineau, Modern Appellate Practice § 17.2, at 262 (1983). However, the law of the case doctrine may not apply when, by legislative enactment, the law has been changed, *Reich v. Miller*, 260 Iowa 929, 938, 151 N.W.2d 605, 610 (1967), or where the controlling law has been clarified by judicial decisions following demand. See, e.g., *England v. Hosp. of Good Samaritan*, 14 Cal.2d 791, 97 P.2d 813 (1939) (Where the controlling rules of law have been altered or clarified in the interval between the first and second appeal and adherence to the law of the case would result in defeating a just cause, the appellate court should not hesitate to reconsider its prior determination.).

This Court could issue a differing ruling if it determined that Judge Novak had improperly applied the law or the law had changed since the precise issue had been visited and ruled on.

> A ruling not objected to or excepted to, nor appealed from, is binding and conclusive on the appellate court as the law of the case concerning the matter to which it is directed. 5 C.J.S. Appeal

> & Error § 1464(1) (1958). See also *State v. Steffens*, 282 N.W.2d 120, 121 (Iowa 1979). The "law of the case" arises only after a ruling becomes final. *Avoca State Bank v. Merchants Mutual Bonding Company*, 251 N.W.2d 533, 539 (Iowa 1977). Despite a change of judges, a court may correct its own error before final judgment. *Cowman v. LaVine*, 234 N.W.2d 114, 124 (Iowa 1975).

City of Ankeny v. Armstrong Co., Inc., 353 N.W.2d 864, 867-68 (Iowa App. 1984). This Court does not find reason to do so. Judge Novak's ruling was not erroneous and the United States Supreme Court, neither expressly nor by operation, has overruled its opinion in *Garcia*.

> The Fourth Circuit Court of Appeals recently addressed a similar argument.
>
> Lower federal courts have repeatedly been warned about the impropriety of preemptively overturning Supreme Court precedent. E.g., *Agostini v. Felton*, ___ U.S. ___, ___, 117 S.Ct. 1997, 2017, 138 L.Ed.2d 391 (1997). The Supreme Court's direction has been crystal clear: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-22, 104 L.Ed.2d 526 (1989). That apparently is the situation here: *Garcia* is specifically on point; *Printz's* contrary intimations are only generally instructive.

West v. Anne Arundel County, Md. 137 F.3d 752, 760 (4th Cir. 1998). Until the United States Supreme Court decides

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to overturn *Garcia* it is for this Court not to speculate on what it might do and to follow its holding in *Garcia*.

Issue C. Salary-Basis Test and Window of Corrections

Salary-Basis Test. The FLSA allows employers to avoid paying overtime compensation to employees who are employed in a "bona fide executive, administrative or professional capacity," 29 U.S.C. §213(a)(1). Regulations promulgated by United States Department of Labor (DOL) under this statute create a two-part test to determine if an employee meets this exemption standard. 29 C.F.R. § 541.118. The two tests are: (1) the *salary-basis test;* and (2) the *duties test*. Twenty-two (22) of the Plaintiffs have admitted that they meet the *duties test*. The remaining Plaintiffs dispute that they meet the *duties test*. However, as noted by counsel for both Plaintiffs and Defendants in their briefs, the *duties test* is not at issue in these Motions for Summary Judgment and need not be discussed.

The salary-basis test states:

> [a]n employee will be considered to be paid 'on a salary basis' . . . if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

29 C.F.R. § 541.118(a). Public employees subject to deductions in pay for disciplinary reasons will change the status of an exempt employee to a nonexempt status. *Auer v. Robbins*, 519 U.S. 452, ___, 117 S.Ct. 905, 909, 137

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L.Ed.2d 79, ___ (1997). This concept of when an employee was "subject to" a pay deduction for disciplinary reasons so as to trigger the loss of the salaried status and impose on the employer an obligation to pay all employees in that class for overtime and the impact of the *Auer* decision is succinctly described in *West v. Anne Arundel County, Md.*, 137 F.3d 752 (4th Cir.1998), decided after *Auer*:

> At the time of trial, the courts of appeals were divided on the question of whether merely being *subject to* impermissible reductions even if a deduction is never exacted, defeats salary basis. Compare, *e.g.*, *Kinney v. District of Columbia*, 994 F.2d 6, 11 (D.C.Cir.1993) (holding that if an employee's pay can theoretically be docked, that employee is "subject to deduction" within the meaning of 29 C.F.R. § 541.118(a) and thus is not salaried), with *Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir.1991) (holding that employee loses salaried status only if their pay is actually docked). However, during the pendency of this appeal, the Supreme Court resolved this circuit split. See *Auer*, 519 U.S. at ___-___, 117 S.Ct. at 910-11. The Supreme Court interpreted the FLSA regulations to mean that employees lose salaried status if they "are covered by a policy that permits disciplinary or other deductions in pay 'as a practical matter.' " *Id.* at ___, 117 S.Ct. at 911 (quoting Secretary of Labor's brief as amicus curiae). "That standard is met . . . if there is either [1] an actual practice of making such deductions or [2] an employment policy that creates a 'significant likelihood' of such deductions." *Id.*

Id. at 762. (Emphasis added.)

Since the Supreme Court decision in *Auer*, a number of federal district and circuit courts have been required to apply *Auer* to similar facts as now before this Court. Their analysis and conclusions are instructive here in answering the question whether the Department had "either [1] an actual practice of making such deductions or [2] an employment policy that creates a 'significant likelihood' of such deductions." See *McGuire v. City of Portland*, 159 F.3d. 460, 463 (9th Cir. 1998) (no actual practice of docking; no "substantial likelihood" under policy); *West v. Anne Arundel County, Md.* 137 F.3d. 752 (4th Cir. 1998) (no actual docking; no "substantial likelihood" under policy); *Haywood v. North American Van Lines, Inc.*, 121 F.3d. 1066, 1069 (7th Cir. 1997) (no actual docking; no "substantial likelihood" under policy); *Stanley v. City of Tracy*, 120 F.3d. 179, 184 (9th Cir. 1997) (no actual practice of pay deductions; no "substantial likelihood" under policy); *Childers v. City of Eugene*, 120 F.3d 944 (9th Cir. 1997) (one-time actual suspension without pay); *Davis v. City of Hollywood*, 120 F.3d 1178 (11th Cir. 1997) (no actual docking of pay; relief based on window of corrections); *Ahern v. County of Nassau*, 118 F.3d 118 (2nd Cir. 1997) (like *Auer*, one incident of actual docking of pay, held not actionable); *Carpenter v. City & County of Denver, Colo.*, 115 F.3d 765 (10th Cir. 1997) (no evidence of actual practice; no "substantial likelihood" under policy manual); *Arrington v. City of Macon*, 991 F.Supp. 1474 (M.D. Ga. 1997) (after *Auer* decision and remand, held city could utilize window of corrections even when disciplinary deductions from pay made pursuant to established policy – see below at 973 F.Supp. 1467); *Marden v. Town of Bedford, N.Y.*, 989 F.Supp. 500, 503 (S.D.N.Y. 1997) (no actual practice; no

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"substantial likelihood" under policy); *Digiore v. Ryan*, 987 F.Supp. 1045 (N.D.Ill. 1997) (actual practice of five (5) disciplinary deductions in an approximately two (20 year period still able to avail itself of the window of corrections); *Hoffmann v. Sbarro, Inc.*, 982 F.Supp. 249 (S.D.N.Y. 1997) (several instances of disciplinary deductions; applicability of defense of window of corrections dependent on facts developed in discovery); *Arrington v. City of Macon*, 973 F.Supp. 1467 (M.D.Ga. 1997) (see above – 991 F.Supp. 1474).

The Court cannot find based on the record before it for summary judgment that the Department did have an actual practice of imposing deductions from pay for disciplinary reasons and that the Plaintiffs are no longer exempt from the overtime pay requirements of the FLSA. As set out above, Plaintiffs have established eight instances of improper deductions from pay, six involving Plaintiffs. However, only two deductions were for periods potentially less than a week. Sergeant Heimgartner was suspended on July 1, 1992 for one (1) day. Lieutenant Pedersen was suspended on August 27, 1993 for one (1) day. The other six suspensions were for periods of either five (5) or ten (10) days each. As discussed by the Ninth Circuit Court of Appeals in *Childers v. City of Eugene*, 120 F.3d 944, 945 (9th Cir. 1997): "Under the FLSA, an employer may not suspend an exempt employee without pay for a period of *less than one week* based upon performance deficiencies. Footnote 1. "(Emphasis added.) At footnote 1, that court explained:

> Section 541.118(a) provides, in pertinent part, that "the employee must receive his full salary for any week in which he performs any work

> without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work." 29 C.F.R. § 541.118(a). Thus, salaried employees may be suspended without pay for the period of a week but must be compensated where they are suspended for a period of less than a week.

See also *Stanley v. City of Tracy*, 120 F.3d 179 (9th Cir. 1997) ("Because the warnings could have referred to suspensions in *full-week* increments, which would have been consistent with salaried status, see 29 C.F.R. § 541.118(a), they did not 'effectively communicate' that impermissible suspensions would be made.")

With this in mind, if the Commissioner of Public Safety's suspensions of either five (5) or ten (10) day increments are the same as suspensions for one-week or two-week periods, then under the DOL's own regulation, these six incidents would not be violations and require the loss of the salaried status exemption. However, from the record, this Court cannot determine if five (5) and ten (10) day suspensions equate to one-week and two-week time periods allowed by the regulation. Under *Auer*, one suspension is definitely not an "actual practice" of disciplinary suspensions without pay which requires loss of the salaried exemption and payment of overtime. Two such suspensions is a much closer question. Several of the cases cited above found more than that number did not cause a loss of the salaried exemption. *See, Davis v. City of Hollywood*, 120 F.3d 1178 (11th Cir. 1997); *Digiore v. Ryan*, 987 F.Supp. 1045 (N.D. Ill. 1997); and *Arrington v. City of Macon*, 973 F.Supp. 1467 (M.D.Ga. 1997).

This same fact problem arises for the Court in trying to determine if the Department's policy "created a substantial likelihood" of imposing disciplinary sanctions without pay. Because this Court determines the summary judgment motions on the "window of corrections" issue, it finds no need to further address the disputed facts which prevent summary judgment on the salary-basis analysis of either "actual practice" or "substantial likelihood" of disciplinary deductions.

Window of Corrections. Under the salary-basis test there is an opportunity to correct deductions from pay to avoid the DOL regulation from being imposed, loss of the exemption and overtime pay being required. This is known as the "window of corrections." The regulation states:

> The effect of making a deduction which is not permitted under these interpretations will depend on the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. *On the other hand,* where a deduction not permitted by these interpretations is inadvertent, *or* is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

29 C.F.R. § 541.118(a)(6) (Emphasis added).

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Before *Auer*, there was a clear split in jurisdictions on how the "window of corrections" regulation should be applied when deductions have been taken pursuant to an established policy. Plaintiffs, relying on pre-*Auer* cases, including *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), argue that the Department is not allowed to take advantage of the window of corrections when there have been multiple deductions from pay for disciplinary reasons which in no way can be found to be "inadvertent" when done under an established written policy.

Since *Auer*, the courts interpreting the window of corrections have held that the window is open and available to employers who have made multiple deductions even though not inadvertent and pursuant to a written policy, if done for reasons other than lack of work.

> FLSA provides a "window of corrections" defense to employers who unintentionally violate the salary basis test. Section 541.118(a)(6) provides that "where a deduction not permitted by [the salary basis test] is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." 29 C.F.R. § 541.118(a)(6). The *Auer* court held that the window of corrections defense should apply where the deductions in question were *either* inadvertent *or* made for reasons other than lack of work. *Id.* at ___, 117 S.Ct. at 912 (emphasis added). The district court found that the City's suspension of one exempt employee in ten years reflected a "decidedly unintentional failure to adhere to § 541.118(a)'s

> requirements," entitling them to the window of corrections defense.
>
> Our previous decision in *Abshire* held that an employer is not entitled to the window of corrections defense where an employment policy nominally subjects exempt employees to disciplinary suspensions. *Abshire*, 908 F.2d at 488-89. This holding in *Abshire*, like the salary basis test holding discussed above, is also implicitly overruled by *Auer* which allowed the defense under those circumstances. ___ U.S. at ___, 117 S.Ct. at 912.
>
> In this case, the City has reimbursed the suspended employee and has made every effort to comply with the FLSA's requirements, including adopting a disciplinary policy forbidding the suspension of any exempt employee for a period of less than one week. The district court did not err in concluding that the City was entitled to the window of corrections defense.

Childers v. City of Eugene, 120 F.3d 944, 947 (9th Cir. 1997). See also *Davis v. City of Hollywood*, 120 F.3d 1178, 1181 (11th Cir. 1997) (Footnote 2: "One of the arguments appellants press is that this court erred in holding that the window of correction must be read disjunctively. [Citation omitted.] We note that the Supreme Court recently embraced this court's view. *See Auer v. Robbins*, ___ U.S. ___, ___. 117 S.Ct. 905, 912, 137 L.Ed.2d 79 (1997) ('[T]he plain language of the regulation sets out 'inadvertan[ce]' and 'made for reasons other than lack of work' as *alternative* grounds permitting corrective action.') (second alteration and emphasis in original.")))

THOMAS J. MILLER
ATTORNEY GENERAL

Department of Justice

ADDRESS REPLY TO:
HOOVER BUILDING
DES MOINES, IOWA 50319
TELEPHONE: 515/281-5164
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TO: Trish, Cockle Printing

FROM: Jane Ambrozic
Iowa Attorney General's Office

DATE: November 29, 2001

RE: State of Iowa v. Royce L. Anthony

Enclosed is a state warrant, in the amount of $300, for filing fees for our Petition for Writ of Certiorari in the United States Supreme Court.

ACCOUNT NUMBERS

0001-02-112-801-2700-2826

State of Iowa Warrant

VOID 6 MONTHS AFTER 11-20-01 No. 02829816

TO THE *Treasurer of State*
Des Moines, Iowa 50319

33-72
730

Pay to the order of

DEPARTMENTAL REFERENCE NO'S

AMOUNT

CLERK, US SUPREME COURT 112AG323031 00000011200 6 $*******300.00
ONE 1ST ST NE
WASHINGTON DC
20543

6888878A7A37470

In *Balgowan v. State of New Jersey*, 115 F.3d 214 (3rd Cir. 1997), that court stated:

> As a final note, the Supreme Court in *Auer* stated that the salary test's "window of corrections," 29 C.F.R. § 541.118(a)(6), is available too preserve the exempt status of employees who have been subjected to pay deductions inconsistent with the salary-basis test. The Court emphasized that the employer could reimburse employees not only if the deductions were "inadverten[t]", but also if they were "made for reasons other than lack of work." *Auer*, ___ U.S. at ___, 117 S.Ct. at 912 (quoting 29 C.F.R. § 541.118(a)(6) (alteration added)). Accordingly, if *any* DOT engineer's pay had been docked, the "window of corrections" exemption could have been used by the State to preserve that engineer's exempt status.

Id. at 219. (Emphasis added.)

In light of these cases since *Auer*, this Court finds, based upon the undisputed facts, each of the suspensions without pay upon which Plaintiffs rely were "made for reasons other than lack of work," need not have been "inadvertent," and the Defendants are entitled to assert and rely on the "window of corrections."

1. Reimbursement for Deductions Taken

Plaintiffs argue the State lacks good faith in repaying its employees for deductions taken. Plaintiffs accurately state that these deductions took place several years ago. Plaintiffs then contend that the State cannot now promise

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to pay back these deductions to avail itself of the window of corrections.

Reimbursement need not occur immediately after the improper deduction is found. *Auer*, 519 U.S. at ___, 117 S.Ct. at 912, 137 L.Ed.2d at ___. The regulation does not state any time period in which repayment should occur. *Id.*

The State has begun the process to reimburse these employees. The litigation determining whether the deductions taken by the State violated the FLSA has been a long process. The State has consistently taken the position until recently and during this litigation that it was not violating FLSA by its disciplinary deductions. The State was aware that there was controversy about the type of deductions it was making but it cannot be said the State knew those deductions violated the FLSA until the United States Supreme Court decision in *Auer*. Reimbursements made to plaintiffs during the course of litigation to satisfy this requirement of the window of corrections have been approved by other courts. See, *Davis v. City of Hollywood*, 120 F.3d 1178, 1180 (11th Cir. 1997) and *Arrington v. City of Macon*, 991 F.Supp. 1474, 1476 (M.D.Ga. 1998).

2. Promise to Comply in the Future

By explicitly changing its policy regarding disciplinary deductions, the employer has promised to comply in the future. *Digiore v. Ryan*, 987 F.Supp. 1045, 1056 (N.D. Ill. 1997), *Arrington v. City of Macon*, 973 F.Supp. 1467, 1475 (M.D.Ga. 1997).

The undisputed facts establish the State has changed its policy regarding disciplinary deductions for Department personnel. It no longer deducts pay from employees' salaries; instead, it engages in "paper suspensions." This is sufficient to show a promise by the State to comply in the future.

3. Conclusion

This Court finds that the Defendants can avail themselves of the window of corrections under the salary-basis portion of the exemption test. Therefore, as to the twenty-two (22) Plaintiffs who have admitted they meet the duties test, the Defendants are entitled to summary judgment for the violations of the FLSA in that the employees have not lost their exempt status as per the window of corrections regulation. For those remaining Plaintiffs who have not admitted they meet the duties test, this Court grants summary judgment in favor of the Defendants only on the salary-basis portion of the exemption test.

VI. MOTION TO STRIKE

Issue D. Memo and Attorney-Client Privilege

Defendants' Motion to Strike seeks to strike from evidence a memorandum they claim is protected by the attorney-client privilege. Defendants contend that a memo dated March 30, 1994 from Assistant Iowa Attorney General Jeffrey Farrell to Commissioner Wieck is protected by that privilege. Defendants further contend that any discovery related to the memo should be

stricken as based on a privileged document. Around the time of its creation, a copy of the memo was given to Colonel Usher by either counsel or Commissioner Wieck while Usher was still an active State Patrol employee and before he was a "Plaintiff" in this action. Usher then provided a copy of this memo to other State Patrol employees about that same time as they were discussing the overtime pay issue. The memo was later provided to Plaintiffs' counsel by one of the State Patrol employees. Defendants also contend such disclosure by Usher was unauthorized and does not destroy the privilege. Plaintiffs contend that the attorney-client privilege was lost at various stages of the proceedings because of its use and disclosure in the discovery process, and its continued use as evidence should not be prohibited.

"An objection to the admission of evidence must be made as soon as the grounds for the objection become apparent." *Roberts v. Newville*, 554 N.W.2d 298, 300 (Iowa App. 1996), citing *Milks v. Iowa Oto-Head and Neck Specialists, P.C.*, 519 N.W.2d 801, 805 (Iowa 1994). The attorney-client privilege exists between public agencies and their lawyers. *Tausz v. Clarion-Goldfield Community School Dist.* 569 N.W.2d 125, 128 (Iowa 1997). The attorney-client privilege exists to protect communications between an attorney and client and to keep these communications from being used by an opposing party in litigation. *Young v. Gibson*, 423 N.W.2d 208, 209-210 (Iowa App. 1988). "The attorney-client privilege evaporates upon any voluntary disclosure of confidential information to a third party." See, *State v. Romeo*, 542 N.W.2d 543, 548 (Iowa 1996), *Carter v. Gibbs*, 909 F.2d 1450, 1451 (Fed. Cir. 1990).

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Although the memo in question was undoubtedly a privileged communication between an attorney and his client, that privilege was lost when the Defendants' attorney submitted the memo in question as an exhibit during the deposition of Earl Usher on February 5, 1996, almost three (3) years ago. As soon as the Defendants' counsel knew that the Plaintiffs were in possession of this memo he should have lodged his objection to the disclosure and use of the memo. His identification of the memo as an exhibit during the deposition of an adversary necessarily waives the privilege that had existed. *See, Carter* 909 F.2d at 1451 (attorney work-product privilege lost when given to an adversary.) Defendants' argument that the memo was used as an exhibit only for identification purposes and not in a substantive manner also is no benefit. Plaintiffs' counsel and a number of Plaintiffs were provided a copy of the memo well before the deposition. A motion for a protective order could have been filed before the deposition in which it was marked as an exhibit. The memo also could have been identified by adequate description without it being marked as an exhibit and made a part of the record. Whatever privilege the memo might have once possessed has since been lost by Defendants' counsel's own exposure of it to the light of day. Defendants' Motion to Strike must be denied.

VII. ORDER

IT IS THE ORDER OF THE COURT that the Plaintiffs' Motion for Partial Summary Judgment is **DENIED**, and Defendants' Motion for Partial Summary Judgment is **GRANTED**. The Plaintiffs' Petition is dismissed as to any

Plaintiff[2] who admits being subject to the "duties test." The Defendants are entitled to claim the "window of corrections" as to all Plaintiffs' claims.

IT IS THE FURTHER ORDER OF THE COURT that Defendants' Motion to Strike is **DENIED**.

SO ORDERED this 26th day of February, 1999.

/s/ Richard G. Blane II
RICHARD G. BLANE, II,
District Judge
Fifth Judicial
District of Iowa

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[If you require the assistance of auxiliary aids or services to participate in court because of a disability, immediately call your district ADA coordinator at (515) 286-3394. (If you are hearing impaired, call Relay Iowa TTY at 1-800-735-2942.)]

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[2] These particular Plaintiffs will be specifically identified by Plaintiffs' counsel and names submitted to the Court for specific order of dismissal to be entered.

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CLIFFORD DANIEL RAPER, et al. Plaintiffs, v. THE STATE OF IOWA and THE IOWA DEPARTMENT OF PUBLIC SAFETY, Defendants.	No. CL 68918 **ANSWER TO AMENDED AND SUBSTITUTED PETITION** (Filed April 3, 1998)

Defendant State of Iowa and Defendant Iowa Department of Public Safety, in answer to Plaintiffs' Petition, hereby state as follows:

COUNT I

1. Defendants deny that all Plaintiffs are presently employed by Defendants, and that Plaintiffs have met the requirements for bringing a class action. The remainder of the paragraph is admitted.

2. Defendants deny that Plaintiffs have been improperly classified by Defendants as FLSA exempt employees. The remainder of the paragraph is admitted.

3. Paragraph 3 is denied.

4. Paragraph 4 is denied.

5. Paragraph 5 is denied.

6. Paragraph 6 is admitted.

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7. Paragraph 7 is denied.

8. Paragraph 8 is denied.

9. Paragraph 9 is denied.

10. Paragraph 10 is denied.

11. Paragraph 11 is denied for lack of information.

COUNT II

1. Paragraph 1 is denied.

2. Paragraph 2 is admitted.

3. Paragraph 3 is denied.

4. Paragraph 4 is denied.

COUNT III

1. Defendants reaffirm their answers to all of the allegations contained in Counts I and II.

2. Paragraph 2 is denied.

3. Paragraph 3 is denied.

4. Paragraph 4 is denied.

5. Paragraph 5 is denied.

6. Paragraph 6 is denied.

7. Paragraph 7 is denied.

8. Paragraph 8 is denied.

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COUNT IV

1. Paragraph 1 is denied.

2. Paragraph 2 is denied.

3. Paragraph 3 is denied.

4. Paragraph 4 is denied.

5. Defendants deny paragraph 5 because there is no employment contract.

6. Paragraph 6 is denied.

7. Paragraph 7 is denied.

AFFIRMATIVE DEFENSES

1. Plaintiffs' action is barred by the doctrine of sovereign immunity.

2. Plaintiffs' action is barred by the statute of limitations.

3. Plaintiffs' action is barred because Plaintiffs are and have at all times been exempt from the overtime requirements of the Four [sic] Labor Standards Act because they are employed in an executive, administrative, or professional capacity. *See* 29 U.S.C. § 213(a)(1).

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4. Plaintiffs' action is barred by the Tenth Amendment of the United States Constitution.

THOMAS J. MILLER
ATTORNEY GENERAL OF IOWA

/s/ Jeffrey D. Farrell
JEFFREY D. FARRELL
Assistant Attorney General

/s/ Linny Emrich
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Finley Law Firm
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Des Moines, IA 50309

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties in the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at his respective address as disclosed by the pleadings of record herein, with postage fully

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paid and by depositing said envelope in a United States Post Office depository in Des Moines, Iowa, on the
2 day of April, 1998
/s/ Lauren Marriott

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CLIFFORD DANIEL RAPER, et al. Plaintiffs, v. THE STATE OF IOWA and THE IOWA DEPARTMENT OF PUBLIC SAFETY, Defendants.	No. CL 68918 **DEFENDANT'S NOTICE OF CROSS-APPEAL** (Filed March 26, 1999)

Defendant State of Iowa and Iowa Department of Public Safety hereby makes the following cross-appeal by appealing the ruling denying defendants' motion to dismiss, entered by the Honorable Joel D. Novak on October 23, 1997, as well as any portion of the decision entered by the Honorable Richard G. Blane II on February 26, 1999, which denies claims or arguments made by defendants.

THOMAS J. MILLER
ATTORNEY GENERAL OF IOWA

/s/ Jeffrey D. Farrell
JEFFREY D. FARRELL
Assistant Attorney General

/s/ Linny Emrich (by JDF)
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties in the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at his respective address as disclosed by the pleadings of record herein, with postage fully paid and by depositing said envelope in a United States Post Office depository in Des Moines, Iowa, on the
25 day of March, 1999
/s/ Lauren Marriott